# Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd

HIGH COURT (SHAH ALAM) — SUIT NO 22–140–94
JAMES FOONG J
3 AUGUST 1995

***Contract*** *— Sale and purchase of land — Refusal to complete — Delay in partitioning of land — No time limit for completion of sale in agreement — Whether purchaser could sell beneficial rights to third party — Whether vendor entitled to refuse to complete due to delay*

***Contract*** *— Estoppel — Estoppel by conduct — Purchaser of land not incorporated when agreement entered into — Agreement later ratified by purchaser — Vendor treated purchaser as legal entity — Whether estopped from denying legal existence of purchaser*

***Companies and Corporations*** *— Pre-incorporation contract — Ratification — Companies Act 1965 s 35*

***Land Law*** *— Sale of land — Beneficial ownership — Whether beneficial ownership only arises upon payment of full purchase price — Whether purchaser entitled to sell beneficial rights to third party*

***Land Law*** *— Sale of land — Delay in completion — Delay due to partitioning of land — Whether vendor entitled to refuse to complete sale*

***Land Law*** *— Sale of land — Power of attorney — Terms of power more limited than terms in sale and purchase agreement — Whether purchaser could sell beneficial rights to third party — Whether sale to third party carried out under agreement or under power of attorney*

***Contract*** *— Damages — Sale and purchase of land — Special damages for refusal of vendor to complete sale — Whether allowable if specific performance granted*

The plaintiffs, who are registered proprietors of various proportions of undivided shares in a piece of land in Selangor Darul Ehsan ('the land'), agreed to sell their respective undivided shares which amounted to approximately 70% of the land to the defendants. There were two sale and purchase agreements ('the agreements') and 10% of the purchase prices were paid to the plaintiffs. The plaintiffs also granted irrevocable powers of attorney to the defendants for the purpose of partitioning the land into two portions; one representing the portion owned by the plaintiffs and the other for the minority co-proprietors. The agreements stated that the completion date was six months from the date of the agreements or on the date when the issue document of title to the partitioned land was issued. The disputes arose as the application for the partitioning of the land took more than two years and the defendants had attempted to sell their beneficial rights in the land to a third party. The plaintiffs alleged that the defendants had breached the agreements by, inter alia: (i) selling the land to a third party; (ii) not being bona fide purchasers; (iii) having purposely

delayed the process of partitioning; (iv) not being incorporated when the first sale and purchase agreement was entered into; (v) representing to the plaintiffs through a solicitor, Mr Xavier, that the purchase price would be paid within six months from the date of the agreements; and (vi) not informing the plaintiffs that the land was to be compulsorily acquired by the State Government of Selangor. The defendants, on the other hand, counterclaimed for specific performance on the ground that the arbitrary termination of the agreements by the plaintiffs was invalid.

**Held**, dismissing the plaintiffs' claim and allowing the defendants' counterclaim:

(1) A purchaser derives beneficial ownership in land when the sale and purchase agreement for the sale of land is concluded. There is no need for the full balance of purchase price to be paid for beneficial ownership to exist. The defendants as assignees of the plaintiffs' shareholding in the land had the right to sell off their beneficial ownership to a third party. The defendants' powers of attorney were not utilized, instead the selling was in their own capacity as beneficial owners of the land.

(2) In a contract of sale, the question whether a defendant is a bona fide purchaser is irrelevant where there exists no fraud or misrepresentation. What is important is that the agreement contains the fundamental elements, which are voluntary offer and acceptance, followed by valuable consideration paid to the plaintiffs.

(3) From the evidence, there was no deliberate delay in securing the partitioning of the land. In fact, the defendants expedited the process by purchasing an adjoining piece of land with road frontage to secure an access to the land, as was requested by the authorities prior to the approval of the partitioning.

(4) When the first sale and purchase agreement was executed, the defendants were not in existence. However, the agreements were subsequently ratified under s 35 of the Companies Act 1965. Also, the plaintiffs were estopped from raising this issue as they had until just before the trial, accepted the defendants as a legal entity in the first sale and purchase agreement.

(5) There was no uncertainty in the terms of the agreements and it was clear that the main objective of the parties in the agreement was for the completion of the sale to take place after the land was partitioned.

(6) Mr Xavier was the plaintiffs' solicitors, therefore, any representation made by him to the plaintiffs was a matter entirely of no concern to the defendants. Also, there has never been any official notification of the acquisition of the land by the State Government of Selangor.

(7) As the defendants' counterclaim for specific performance was allowed, the counterclaim for special damages was not allowed

A because no actual loss was suffered. There was also no evidence of the losses suffered under general damages.

**[Bahasa Malaysia summary**

Pihak plaintif adalah tuan punya berdaftar beberapa bahagian yang B tidak dibahagikan di dalam sebidang tanah di Selangor Darul Ehsan ('tanah itu') dan telah bersetuju menjual bahagian mereka yang tidak dibahagikan itu, yang berjumlah kira-kira 70% daripada tanah itu, kepada pihak defendan. Terdapat dua perjanjian jual beli ('perjanjian itu') dan 10% daripada harga beli telah dibayar kepada pihak plaintif. Plaintif juga telah memberi surat kuasa wakil tak boleh batal kepada C pihak defendan bagi tujuan memecah sempadan tanah itu kepada dua bahagian; satu mewakili kawasan yang dimiliki oleh pihak plaintif dan yang lainnya mewakili kawasan kumpulan minoriti tuan punya bersama. Perjanjian itu menyatakan bahawa tarikh penyelesaian adalah enam bulan dari tarikh perjanjian itu atau pada tarikh bila dokumen D hakmilik keluaran tanah yang dipecah sempadan itu dikeluarkan. Pertikaian timbul kerana proses pecah sempadan itu mengambil masa lebih daripada dua tahun dan defendan telah mencuba untuk menjual hak benefisial mereka di dalam tanah itu kepada pihak ketiga. Pihak plaintif mengatakan bahawa defendan telah memungkiri perjanjian itu dengan, antara lain: (i) menjual tanah itu kepada pihak E ketiga; (ii) tidak merupakan pembeli 'bona fide'; (iii) telah dengan sengajanya melambatkan proses pemecahan tanah; (iv) tidak diperbadankan apabila perjanjian jual beli yang pertama diikat; (v) membuat representasi kepada plaintif melalui seorang peguamcara, En Xavier, bahawa harga beli akan dibayar dengan sepenuhnya dalam F masa enam bulan dari tarikh perjanjian itu; dan (vi) tidak memberitahu pihak plaintif bahawa tanah itu akan diperolehi secara wajib oleh Kerajaan Negeri Selangor. Pihak defendan pula menuntut balas untuk pelaksanaan spesifik atas alasan bahawa penamatan kontrak secara arbitrari oleh pihak plaintif adalah tidak sah.

G **Diputuskan**, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Seorang pembeli mendapat pemunyaan benefisial di dalam tanah apabila perjanjian jual beli terlaksana. Harga penuh tidak perlu dibayar untuk wujudnya pemunyaan benefisial. Defendan sebagai H pemegang serahhak syer pihak plaintif di dalam tanah itu mempunyai hak untuk menjual pemunyaan benefisial mereka kepada pihak ketiga. Surat kuasa wakil defendan tidak digunakan, sebaliknya penjualan dilakukan dalam keupayaan mereka sendiri sebagai pemunya benefisial tanah itu.

I (2) Di dalam sesuatu kontrak penjualan, persoalan sama ada seorang defendan adalah pembeli 'bona fide' adalah tidak relevan di mana tiadanya fraud atau salah nyata. Apa yang penting ialah supaya perjanjian itu mempunyai unsur-unsur asasi, iaitu tawaran dan penerimaan sukarela, diikuti oleh balasan bernilai yang dibayar kepada plaintif.

(3) Daripada keterangan yang telah diberikan, tiada kelewatan yang disengajakan dalam mendapatkan pemecahan sempadan tanah itu. Sememangnya, pihak defendan telah berusaha untuk mempercepatkan proses pemecahan sempadan tanah itu dengan membeli tanah bersempadanan yang berhadapan dengan jalan untuk mendapatkan akses ke tanah itu, seperti yang dikehendaki oleh pihak berkuasa sebelum memberikan kelulusan untuk pecah sempadan.

(4) Apabila perjanjian jual beli yang pertama itu terlaksana, pihak defendan belum wujud lagi. Walau bagaimanapun, perjanjian itu kemudiannya diratifikasi di bawah s 35 Akta Syarikat 1965. Juga, plaintif adalah diestop daripada menimbulkan isu-isu itu kerana sebelum perbicaraan, mereka telah menerima defendan sebagai entiti undang-undang yang sah di dalam perjanjian jual beli yang pertama.

(5) Tiada ketidakpastian terma di dalam perjanjian itu. Ia adalah jelas bahawa objektif utama pihak-pihak di dalam perjanjian itu adalah supaya penjualan itu akan selesai pada masa tanah itu dipecah sempadankan.

(6) En Xavier adalah peguamcara plaintif, maka, sebarang representasi yang dibuat olehnya kepada plaintif tidak ada kaitannya dengan pihak defendan. Juga, tidak pernah ada notis yang sah tentang pengambilan tanah itu oleh Kerajaan Negeri Selangor.

(7) Oleh kerana tuntutan balas defendan untuk pelaksanaan spesifik telah dibenarkan, tuntutan balas untuk ganti rugi khas tidak dibenarkan kerana kerugian yang sebenar tidak dialami. Juga, tiada keterangan tentang kerugian am yang dialami.]

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal.]

## Notes

For cases on damages, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1442–1494.

For cases on the sale of land, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2063–2136; 8 *Mallal's Digest* (4th Ed) paras 1783–2023; [1991] Mallal's Digest 1398–1417; [1992] Mallal's Digest 1262–1275; [1993] Mallal's Digest 982–1003; [1994] Mallal's Digest 1650—1667.

## Cases referred to

*Lysaght v Edwards* (1876) 2 Ch D 499 (folld)

*M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 (distd)

*Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 (refd)

*Peninsular Land Development v K Ahmad* [1970] 1 MLJ 149 (refd)

**Legislation referred to**

Companies Act 1965 s 35

*R Arunachalam* (*Mohd Idris Habib* with him) (*Mohd Idris & Associates*) for the plaintiffs.

*RR Sethu* (*Chan Gek Choo* and *Saw Mei Lin* with him) (*PM Tan, Chan & Partners*) for the defendant.

**James Foong J**: The plaintiffs are the registered proprietors of various proportions of undivided shares in a piece of land held under Geran 35908 for Lot 3514 Mukim of Rawang, Daerah Gombak, Selangor ('the said land'). Their undivided shares amount to approximately 70% or more of the entire shareholdings in the said land.

By two agreements in writing dated 12 April 1991 and 12 November 1991 (the agreement dated 12 April 1991 shall be referred to as 'the first sale and purchase agreement' and both the agreements dated 12 April 1991 and 12 November 1991 shall be jointly referred to as 'the said agreements') respectively, the plaintiffs agreed to sell their respective undivided shares in the said land ("the plaintiffs' shareholdings") to the defendants, their nominee or nominees. The said agreements have identical terms and conditions except for the difference in particulars relating to the vendors and the amount of purchase price corresponding to the amount of undivided shares owned by each plaintiff. Under the said agreements the plaintiffs were paid a sum equivalent to 10% of their respective purchase price. As for the first plaintiff he had received up to 20% of his purchase price from the defendants.

Under cl 10 of the said agreements, the "completion date of this sale and purchase of the said land shall be six months from the date of this agreement or on the date on which the issue document of title pertaining to the total acreage of the land sold jointly by the vendors is released to the purchaser's solicitors (which date is later)". 'Completion date' under cl 3(a) of the said agreements means the date when the balance of the purchase price is to be paid.

Under cl 4 of the said agreements, the respective solicitors acting for the vendors and purchasers are named as:

(a) Messrs Xavier & Chandran for the vendors; and

(b) Messrs Tengku Mohamed Achan & Lim for the purchasers.

There is also a provision under the said agreements for the execution of the memoranda of transfer by the plaintiffs at the time of signing of the said agreements, and the same be kept by the purchasers' solicitors for the purpose of adjudication and subsequent transfer after the completion date.

Clause 8 of the said agreements further provides for the granting of an irrevocable power of attorney by the plaintiffs to the defendants 'for the purpose of partitioning of the said land through normal process as provided for in the National Land Code ...'. This was duly performed by the plaintiffs on 15 April 1991 and 12 November 1991, respectively, when the

defendants were granted two deeds of irrevocable power of attorney ('the powers of attorney'). A

Upon entering into another agreement to purchase a further amount of undivided shares from one other owner on 12 December 1991, the defendants through their surveyors in January 1992 applied to partition the said land into two. According to the evidence of the surveyor, DW5, various problems were encountered in this process. It was not until 4 February 1994 that the application for partition was approved. This led to the original document of title to the said land to be surrendered and cancelled by the land office resulting in the reissuance of two separate documents of title on 27 June 1994. B C

Disputes would not have arisen, in the opinion of this court, if two things had not happened. First, if the application for the partition of the said land had not taken such a long time, and secondly, if the defendants had not attempted to sell their beneficial rights or interest or ownership in the said land to a third party. The latter happened on 22 June 1992 when the defendants, describing themselves as 'beneficial owners of undivided $^{218}/_{272}$ shares' in the said land, attempted to sell such rights, interest or beneficial ownership to a company by the name of Austral Amalgamated Tin Bhd ('AATB'). What seems to have caused the furore among the plaintiffs when they heard this news was that the consideration involved in this transaction was RM100,000 per acre, as compared to RM32,000 or slightly more per acre to be paid by the defendants to the plaintiffs. D E

Towards the end of 1993 when the partition of the said land was pending approval, some of the plaintiffs threatened to terminate the said agreements unless the balance of the purchase prices was paid. A legal firm, Messrs Mohd Idris & Associates, by letters dated 12 and 13 January 1994 respectively, claiming to be acting for all the plaintiffs gave seven days' notice to the defendants to terminate the said agreements, and to revoke the powers of attorney. The defendants through their solicitors replied rejecting such plaintiffs' attempts and insisted on specific performance. F

When this case came up for trial in this court, the land was already partitioned into two, and there is now two separate issue documents of title for each of the partitioned parts of the said land. These two documents of title are in the land office pending collection. G

Further, from the evidence tendered, the attempted sale by the defendants to AATB was aborted. In its place the defendants have entered into two new sale and purchase agreements, one with Magnum Corp Bhd ('Magnum') and the other with Cempaka Madu Sdn Bhd ('Cempaka'), both on 10 September 1993 to sell off their beneficial rights, interest and ownership over the said land. These agreements, this court is told, are still subsisting pending the outcome of this trial. H

Realizing the said agreements provide for no specific time limit to the defendants to secure the partition of the said land, the plaintiffs and their solicitors scrutinized practically every action of the defendants past and present, and on all available documents to find a basis to terminate the said agreements. I

A They finally came up with the following grounds to support their contention that the defendants have breached the said agreements:

(1) the defendants have sold the said land to a third party;

(2) the defendants were not bona fide purchasers;

B (3) the defendants have purposely delayed the process of partition;

(4) the defendants were not incorporated when the first sale and purchase agreement was executed;

(5) the said agreements are void for uncertainty of terms;

(6) the solicitor, one Mr Xavier, had represented to the plaintiffs that the C purchase price will be paid within six months from date of the said agreements; and

(7) the defendants have not informed the plaintiffs that the said land was to be compulsorily acquired by the State Government of Selangor.

D The defendants obviously denied each and every one of these allegations, and their reasons shall be elaborated on as this judgment proceeds.

The first issue of the plaintiffs' is based mainly on the powers of attorney. Clause 6 therein provides as follows:

> E This power does not empower our attorney/attorneys to charge, mortgage, sell, assign or do any act or thing that will encumber all our rights title and interest in and to our said undivided share of the said land and/or negotiate, sell and transfer off our undivided shares of the said land to any other person or persons and for that purpose to sign and execute all transfer and other instrument necessary for effecting the said transfer.

F Due to the defendants' act in entering into sale and purchase agreements with AATB and subsequently with Magnum and Cempaka, the plaintiffs alleged that the defendants have breached the aforesaid clause.

The defendants however argued that cl 6 of the powers of attorney differs from other clauses in the said agreements where they are permitted to sell off their beneficial rights, interest and ownership in the said land to G any third party.

The plaintiffs, however, even denied such a right of the defendants exist for reason that until the full balance of the purchase price is paid, the defendants have no 'beneficial ownership' to the said land. A number of authorities in support of this proposition, notably *M & J Frozen Food Sdn* H *Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, and *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53, were cited.

The issue therefore before this court are two; first, whether by the said agreements the defendants have derived a beneficial right or ownership over the said land, and secondly, if they have, whether they are permitted I to dispose of the same to a third party.

The law on the question of whether a purchaser under a sale and purchase agreement for a landed property derives a right, interest or beneficial ownership over the said land purchased is supposed to be settled in our law. However, the plaintiffs' proposition that this beneficial ownership

does not arise until the full balance of the purchase price is paid, requires this court to re-examine the various decided authorities on this point.

In the case of *Lysaght v Edwards* (1876) 2 Ch D 499, Jessel MR has defined the rights of a purchaser under a contract of sale as follows:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; ... it is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.

Because the above judgment relates to landed properties in England, the plaintiffs' counsel has impressed upon this court that English principles should not apply in our country where the Torrens system of land registration is being practised. However, it is disappointing to say that this proposition would not be necessary if learned counsel had continued to read the judgment of Suffian FJ (as he then was) in the case of *Peninsular Land Development v K Ahmad* [1970] 1 MLJ 149 at p 151 col 1F which adopted the above principle of Jessel MR by saying that it 'applies also in jurisdictions where there is registration of titles'.

The existence of a beneficial ownership under the contract of sale and purchase of land is further confirmed by Ali FJ in the Federal Court case of *Macon Engineering Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53, where again adopting the passage of Jessel MR in *Lysaght v Edwards* as law, he explained that:

> As I understand the above passage what passes under a contract for sale is only the beneficial ownership ... the vendor who still holds the interest in land does so hold as trustee and not as owner.

So it is clear that after a sale and purchase agreement for the sale of land is concluded, the purchaser under our Malaysian law derives a beneficial ownership to the said land. But what follows next is the remarks of Suffian FJ (as he then was) in the *Peninsular Land Development* case where it is stated as follows:

> In my judgment, the company becomes in equity a trustee for the plaintiff and the beneficial ownership passes to the plaintiff as soon as the purchase price has been paid.

This, according to the plaintiffs' counsel would mean that beneficial ownership in landed property would not pass to the purchaser after the execution of the sale and purchase agreement until the full balance of the purchase price is paid. To strengthen his argument, the learned counsel then proceeded to quote from the judgment of the Supreme Court in the case of *M & J Frozen Food* [1994] 1 MLJ 294 at p 305 where Wan Yahya SCJ expressed as follows:

> Although the authorities seem to differ on the level of transaction at which the bare or constructive trusteeship would arise, the rationale are unanimous on one issue, ie such trusteeship can only arise on payment of the balance

of the purchase price or on payment of the full purchase price. In *Peninsular Land Development v K Ahmad* [1970] 1 MLJ 149, Suffian FJ (as he then was) said that the beneficial ownership passes to the purchaser as soon as the purchase price has been paid. So was it held in a New Zealand case of *Official Assignee v Johnson* (1975–1977) ALR 285 where the court held that the purchaser only becomes owner of the land subject to his obligation to pay the purchase price.

After a careful perusal of the aforesaid dictums particularly that of Suffian FJ (as he then was) in the *Peninsular Land Development* case, this court is of the humble opinion that the 'judgment' of the learned judge in that case must be strictly confined to the facts of that particular case where the full balance of the purchase price had already been paid. This must be so, for the learned judge had in the earlier part of his judgment accepted the principle enunciated by Jessel MR which stressed on the creation in equity of trusteeship in the vendor for the purchaser's right after a sale and purchase agreement has been entered into, and the rights of the vendor are only reduced to a charge or lien over the land sold including that of retaining possession (unless otherwise agreed) as a security for the payment of the balance of the purchase price. The beneficiary in this trust must be the purchaser and the rights so formulated must be the beneficial ownership to the said land. This beneficial ownership would be transformed to a complete legal ownership when the full balance of the purchase price is paid, and the land is thereafter transferred and registered in the name of the purchaser as proprietor under the National Land Code 1965. To rule otherwise, would give absolutely no meaning to the principle expressed Jessel MR in *Lysaght*'s case which has been adopted into our law. It would be ludicrous to on one hand accept that a beneficial ownership exist after the sale and purchase agreement is executed, while on the other stating that such beneficial ownership can only exist when the full balance of the purchase price is paid; this certainly is a direct contradiction in terms. Similarly, the findings of the learned Supreme Court judge in *M & J Frozen Foods* case must be taken within the context that it applies only to the facts of the *Peninsular Land Development* case for it was on this decision (of the *Peninsular Land Development* case) that Wan Yahya SCJ relied when he found that beneficial ownership only passes to the purchaser as soon as the purchase price has been paid.

Having settled this issue, this court shall now examine first, whether the said agreements permit the defendants the right to sell off their beneficial ownership in the said land to a third party. A perusal of the said agreements reveals the rampant usage of the word 'assignee' after the word 'purchaser', throughout. By this, it is significantly clear that the parties, particularly the plaintiffs, have agreed to recognize the rights of the defendants' assignees, which would include the transfer to such assignees of the plaintiffs' share holdings in the said land. An 'assignee' by definition in *Osborn's Concise Law Dictionary* (8th Ed) means 'a person to whom an assignment is made', and 'an assignment' is defined in the same dictionary as 'a transfer of property'. If it is a transfer of property, one can only transfer what one has, and in this case, as far as the defendants are concerned they have only their beneficial ownership to the said land. This thereby gives the defendants a right under the said agreements to sell off their beneficial ownership to a

third party. Though this may be permitted, there is a differing term in the form of cl 6 in the powers of attorney which prohibits such attempts of sale or transfer of the plaintiffs' shareholding to a third party. In order to deliberate on this matter, one must understand the nature and purpose of a power of attorney. A

'A power of attorney is a formal instrument by which one person, the donor of the power, confers on another, the donee, power to act on behalf of the donor in the performance of a specific act or classes of act or generally' (4 *Halsbury's Laws of England* (4th Ed, Reissue) at para 627). By such a creation, the donor as principal shall be liable to a third party for the acts of the donee, his agent, if the donee has acted within the bounds of his authority or such acts of the donee being subsequently rectified by the donor. The law applicable under these circumstances between the donor and the donee is therefore that of principal and agent (see 2 *Halsbury's Laws of England* (4th Ed, Reissue) at para 86). B C

Clause 6 of the powers of attorney does not empower the defendants as agents of the plaintiffs to sell or assign or even negotiate to sell and transfer the plaintiffs' rights, title and interest in the said land to any other person or persons. If the defendants were to act on the power of attorney to do what they are not empowered to do, the plaintiffs would have the right not to honour such contrary deeds, nor would the plaintiffs be liable to any third party for such action of the defendants. But, when the defendants proceeded to sell off their beneficial ownership in the said land to a third party, were they prosecuting such actions as agents of their principal? If they were, then a breach of duty has occurred and the plaintiffs would be entitled to their rights as spelled out above, mainly, not to honour such acts and be liable to any third party. However, from the facts adduced there is no evidence of the defendants having utilized the power of attorney to transact with AATM, Magnum and Cempaka on the sale of the plaintiffs' shareholdings. Nowhere is it stated in any of the three sale and purchase agreements with the three third parties' purchasers that the defendants were acting as agent of their principal to dispose of their principals' shareholdings. Under these three agreements, the defendants were in fact transacting and selling in their own capacity their beneficial ownership in the said land. They have not utilized the powers of attorney as an instrument to derive their authority; their authority came from their own contractual rights under the said agreements. D E F G

Such a distinction is essential for the deed of power of attorney only grants specific powers to a donee to act for and on behalf of the donors, but when the donee himself possesses a personal right to act and he proceeds under this capacity rather than the former, then he commits no breach of duty even when his act contradicts the powers granted to him under a deed of power of attorney. Arising from this principle, though the power of attorney contains a contradictory term to the rights arising from the said agreements, the defendants were not in breach of the said agreements when they exercised their rights to sell their beneficial interest since they carried such activities not based on the power of attorney. H I

The second contention is that of the defendants not being a bona fide purchasers of the plaintiffs' shareholdings in the said land. The defendants,

according to the plaintiffs are speculators and have no money of their own to complete this purchase. This, they based on the attempts by the defendants to sell their beneficial ownership to the said land to third parties.

In a contract of sale, the question of whether the defendants are bona fide purchasers is irrelevant where no fraud or misrepresentation exist. The said agreements contain the fundamental elements of voluntary offer and acceptance followed by payment of valuable consideration to the plaintiffs. Whether the defendants are speculators or purchasing the said land for their own development is of no concern of the plaintiffs for the law does not prohibit such activities. As to whether the defendants are able to pay the balance of the purchase price, this can only be determined at the time when such payment is due under the said agreements. If the defendants are unable to pay, then as provided by the said agreements, forfeiture of the initial 10% deposit will be effected. The issue of bona fide purchaser has absolutely no relevance to this case.

The next contention of the plaintiffs is that of deliberate delay by the defendants to secure partition of the said land. In order to determine this issue, it is necessary to note that the plaintiffs' total shareholdings only formed approximately 70% of the entire undivided share in the said land. There were other minority co-proprietors who did not sell their shareholdings to the defendants. This being the case, the said land had to be partitioned into two; one representing the portion owned by the plaintiffs and the other for the other minority co-proprietors, leading to the issuance of two documents of title after partition.

From the evidence by the defendants' surveyor who submitted the relevant applications for partition, and the state officer who processed such applications together with records tendered, there are no traces of acts of deliberate delay in this process of partition. The time may have taken a little longer than normal but all these were within the confines of the administrative process by the relevant authorities. In fact, this court finds the defendants have even gone to greater extent to expedite this process of partitioning by purchasing at great expense a piece of adjoining land which has a road frontage in order to secure an access into the said land, as was requested by the authorities prior to the approval of the partition.

The next contention relates to the time of incorporation of the defendants when the first sale and purchase agreement was executed. This first sale and purchase agreement was executed on 12 April 1991 by one Chan Wah Long 'for and on behalf of the purchaser, Rawang Hills Resort Sdn Bhd'. At that material time, the defendants were not as yet incorporated. According to the evidence of Chan Wah Long (DW2), he purchased a shelf company by the name of 'Bestbond Sdn Bhd'. This company was incorporated on 25 April 1991 but its name was subsequently changed to Rawang Hill Resort Sdn Bhd and finally Rawang Hills Resort Sdn Bhd.

From the evidence as tendered, it cannot be denied that when the first sale and purchase agreement was executed the defendants were not in existence, but this does not prevent the defendants from ratifying such an agreement under s 35 of the Companies Act 1965.

The defendants did exactly this by way of a resolution of directors on 10 May 1991. The plaintiffs' counsel however argued that this resolution was actually a declaration of trust by the defendants to hold this beneficial ownership in the said land on trust for Chan Wah Long himself. Though this may be true, for the purpose of this issue on ratification, this court is of the opinion that the following words, 'That the company do hereby affirm and ratify the purchase of the benefits and rights to the sale and purchase agreement for the acquisition of 186 acres being part of Lot 3514, Mukim of Rawang made up to 12 April 1991' found in the first part of this resolution, is sufficiently clear for the defendants to ratify the said agreements. Ratification can be combined with other matters in a resolution, but so long as its expression of ratification is clear, as in this case, the process of ratification is completed by such an act.

In addition to the above, as rightly pointed out by the defendants' counsel, the plaintiffs are estopped from making this contention by the very fact that they have throughout this period until just before trial accepted the defendants as a legal entity in this first sale and purchase agreement.

As for the submission that the said agreements are void for uncertainty in terms, the plaintiffs' contention centres upon the phrase 'issue document of title pertaining to the total acreage of the land sold jointly by the vendors', found in cl 10 of the said agreements. After perusing through the entire evidence of this case, this court is of the opinion that the main objective of the parties in the said agreements which consequently led to the granting of the power of attorney was for the completion of the sale to take place after the said land was partitioned. The 'issue document of title pertaining to the total acreage' in this context can mean no other than the issue document of title after partition, for it is then that the total acreage equivalent to the plaintiffs' shareholdings would be determined. In fact from the evidence of the sixth plaintiff himself, he has clearly admitted that 'the balance of the purchase price depends upon the land being partitioned'. When the land has to be partitioned then separate documents of title would be issued. Thus under cl 6 of the said agreements, the balance of the purchase price will only be paid, if it is later than six months from date of the said agreements, then only when the issue document of title of the said land after it is partitioned is issued. It is so absurd for the plaintiffs to suggest that the disputed phase refers to a portion of the land taken by a road operating company known as PLUS for highway usage, when the same is not pleaded and supported by substantive evidence. This approach is more likely used by the plaintiffs to cloud the true nature and intention of the parties.

The sixth contention of the plaintiffs is that Mr Xavier has represented to them that the balance of the purchase price would be paid within six months from the date of the said agreements. What surprises this court is that Mr Xavier was clearly the plaintiffs' solicitor in the said agreements. His firm's name is clearly stated in cl 4 to represent the vendors. Any representation by Mr Xavier to the plaintiffs is a matter entirely of no concern to the defendants. It is a matter strictly between the plaintiffs and

their solicitor and cannot be made a ground to allege the defendants' breach of the agreements.

As to the final contention that the defendants have breached the said agreements for having not made known to the plaintiffs a compulsory acquisition of the said land, this court finds absolutely no justification. There has never been any official notification of such an acquisition, and what the defendants did, particularly DW5, was to eliminate any such idea of acquisition by the authorities even before it may be formulated officially. Such acts of the defendants are not a breach of any terms and conditions of the said agreements since there was never any official notification of acquisition.

There was also another allegation that the defendants have not complied with the terms of the said agreements in obtaining FIC (Foreign Investment Committee) approval of the purchase of the plaintiffs' shareholdings in the said land. This issue need not even be considered by this court for it was never pleaded.

Based on the above reasons, this court hereby dismisses the plaintiffs' claim with cost. As for the defendants' counterclaim, this court finds the plaintiffs' arbitrary termination of the said agreements invalid, and accordingly, allows the defendants' claim for specific performance of the said agreements. Consequentially, the memoranda of transfer duly executed by the plaintiffs and tendered in court as exh P15 (1–27) shall be returned to the defendants' solicitors, Messrs PM Tan, Chan & Partners, who shall hold them as stakeholders until the balance of the purchase price is paid by the defendants to the plaintiffs' solicitors, Messrs Mohd Idris & Co, within 30 days, from date of this order in accordance with the mode and manner stated in the said agreements. In the event of the defendants' failure to complete this purchase within the stipulated 30 days, the plaintiffs would have the right to terminate the said agreements under cl 12 therein. Upon payment of the full balance of the purchase price, the defendants shall have the right to obtain from the registrar of land titles the issue documents of title to that partitioned portion of land containing the plaintiffs' shareholdings, thereafter the defendants are entitled to effect transfer of the plaintiffs' shareholdings into their names or to that of their nominee or nominees.

As for the defendants' counterclaim for special damages under prayer (b), this court disallows it as there should be no loss now that specific performance to the defendants is allowed. As for the claim for general damages, this court finds no evidence of any losses suffered by the defendants and therefore also disallows the same. In respect of costs for the counterclaim, this court hereby orders it to be paid by the plaintiffs to the defendants.

*Plaintiffs' claim dismissed; defendants' counterclaim allowed.*

Reported by Azra Azman